Supreme Court, U. S.
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No. 73-1290

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

ITT CONTINENTAL BAKING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. In our petition we noted that the Tenth Circuit's ruling that the prohibited acquisitions constitute single rather than continuing violations of the Commission order threatens seriously to impair the effectiveness of 66 similar orders (Pet. 9-12). Respondent appears to recognize this problem (Br. in Opp. 7), but asserts that the Commission "can readily prevent [its] repetition" by initiating proceedings to modify these orders to include an express ban on "holding" properties acquired in violation of their terms (Br. in Opp. 7, 11, 12). Moreover, respondent asserts that in view of the Commission's statutory power to modify the existing orders, the conflict between the Tenth Circuit's ruling and the Eighth Circuit's ruling in *United States* v. *Beatrice Foods Co.*, No. 73-1120, decided March 8, 1974,[1] on the continuing violation issue "is essentially a matter of academic interest" (Br. in Opp. 13).

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[1]See Supp. Memo for the United States.

However, if the Tenth Circuit's decision is permitted to stand, any effort by the Commission to modify the existing orders to make them effective would likely result in further litigation. For the firms subject to such consent orders undoubtedly would oppose modification, arguing, on the basis of the Tenth Circuit's decision, that it would alter the "bargain" they struck with the Commission in negotiating their orders. The Commission would then be required to relitigate the question presented in this case, on which the Tenth and Eighth Circuits are in conflict.[2]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[2]Respondent contends (Br. in Opp. 2, 13-19) that if the petition for a writ of certiorari is granted, it will be necessary to consider three issues in addition to the issue presented in the petition: (1) whether the agreements between Continental and the three local bakeries constituted acquisitions prohibited by the order; (2) whether ITT Continental is a "successor" to Continental and assumed its liabilities under the order; and (3) whether daily penalties may be assessed for the period after the Commission learns that its order is being violated but does not provide notice to the party that it is violating the order.

Respondent has not filed a cross-petition for a writ of certiorari and it is unnecessary to reach any of these questions in order to determine whether prohibited acquisitions constitute single rather than continuing violations. Therefore, none of these questions is properly before this Court. See, *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4. Moreover, neither the district court nor the court of appeals ruled on the "notice" issue, because it held that the prohibited acquisitions were not continuing violations.

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